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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.M.C. 393/2023

GANPATI ASSOCIATES & ORS. ..... Petitioners

Through: Mr. Manu Sisodia, Advocate.

versus

HERO FINCORP LTD ..... Respondent

Through: Mr. Parashar Vashisht, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

<u>O R D E R</u>

% **06.05.2024**

1. By way of present petition filed under Section 482 Cr.P.C., the petitioners seek quashing of summoning order dated 23.11.2020 passed by learned MM-02, SD/NI Act, South District, Saket Court in Ct. No. 6369/2020 instituted under Section 138 NI Act and Section 200 Cr.P.C.

2. The facts, as discernible from the records, are that the complainant/respondent is a non-banking financial company incorporated under the Companies Act, 1956 and registered with RBI. It has been alleged that the petitioners/accused approached the respondent seeking financial assistance in the form of Machinery Term Loan. The respondent provided financial facility to the tune of Rs.1,05,00,000/- vide Sanction Letter dated 28.07.2017 at an agreed rate of interest. Several documents like Master Facility Agreement, Deed of Guarantee and other Agreements of even date were also executed between the petitioners and respondent. Thereafter, in discharge of their liability, petitioner No.2, on behalf of petitioner No.1, issued a cheque bearing No. 406751 dated 16.09.2020 drawn on Canara Bank, Bhilai for an amount of Rs.1,08,26,002.66/-. When presented for

encashment, the same was returned dishonoured with the remark 'funds insufficient' vide return memo dated 18.09.2020. A demand notice dated 25.09.2020 came to be issued by the respondent, and upon petitioners' failure to repay the amount under the cheque, the subject criminal complaint came to be filed.

Vide the impugned order, the petitioners were summoned as accused in the said criminal complaint.

3. Learned counsel for the petitioners submits that in the complaint, it has been alleged that the petitioner No.1 is a partnership firm whereas petitioners No.2 to 5 have been arrayed as accused in their capacity of being partners of the said firm. Additionally for petitioner No. 2, it has been alleged that he has signed the subject cheque on behalf of the partnership firm. It is contended that though in the complaint it has been alleged that petitioner Nos. 2 to 4 are the partners, however, no additional allegations have been levelled against petitioner Nos. 3 and 4. Further, petitioner No.5 is itself a partnership firm. It is next contended that the complaint has also sought to array petitioner No.3 to 5 as they stood guarantors for the loan.

It is also contended that the complaint lacks necessary averments in terms of Section 141 NI Act, to make petitioner Nos. 2 to 5 vicariously liable. Lastly, it is contended that the legal notice dated 25.09.2020 was never served upon the petitioners and the respondent has failed to mention the date of receiving of the legal notice.

4. Learned counsel for the respondent, on the other hand, has contested the present petition. He submits that the impugned order was passed after due consideration of the facts of the case and that the contentions raised by the petitioners, even if they are true, can only be tested in trial.

5. I have heard learned counsels for the parties and have also perused the material placed on record.

6. At the outset, it must be noted that in the complaint filed before the learned MM, copy of which has been placed on record, the respondent has impleaded petitioner No.1 as the partnership firm and petitioner No.2 as its partner as well as the signatory of the subject cheque. Further, petitioner Nos. 3 to 5 have been arrayed in their capacity as partners of the partnership firm/petitioner No.1. as well as guarantors of the loan.

7. In view of the allegations levelled against petitioner No.1 and 2 are concerned, this Court finds no ground to interfere with the order of summoning qua them.

8. Before proceeding further, this Court takes note of the fact that the present petition is accompanied by the criminal complaint as well as the Loan Sanction letter, Master Facility Agreement, Addendum to Loan Agreement, Supplementary Agreement, Addendum Agreement all dated 28.07.2017. A perusal of the said documents would show that the same were executed between the respondent/complainant and the borrower namely *M/s Ganpati Associates* i.e., petitioner No.1. Petitioner Nos. 2 and 3 are admitted to be its partners. There is no co-borrower. The loan is secured by personal guarantees of petitioner Nos. 2 to 5. The Master Schedule annexed with the Facility Agreement carries the Guarantor details, which reflect that petitioner No.5 is a partnership firm.

9. Although, characteristically, a partnership firm is not treated as a distinct legal entity, distinct from its constituent partners, however, for the purposes of Section 141 of the NI Act, the legal character of a partnership firm, which is accused of committing an offence, is equated with that of an

incorporated Company by way of a deeming fiction. Petitioner No. 1 is alleged to have committed the offence in question, and by virtue of the deeming fiction, will be treated as a Company, and all its partners are vicariously liable for the commission of offence as though they are Directors in a company.

10. A reading of the complaint would show that it has loosely alleged that petitioner nos. 2 to 5 are the partners of petitioner No.1. In the same breath, all of them have also been called the guarantors.

There is no whisper as to how a separate partnership firm i.e., petitioner No.5 has become a partner in Petitioner No.1.

Coming to petitioner Nos.3 and 4, while it is admitted by learned counsel for the petitioner that the former is a partner, however, the said factum of being a partner is denied in case of the latter. At this stage, to examine as to whether by merely being arrayed as a partner, an individual would automatically become vicariously liable under Section 141 of the Act, this Court profitably refers to the recent decision of Supreme Court in Dilip Hariramani *v.* Bank of Baroda [reported as **2022 SCC OnLine SC 579**, wherein it has been observed that:-] . The relevant extract reads as under:

> *"13… In the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and responsible for the conduct of the affairs of the firm, an expression interpreted by this Court in Girdhari Lal Gupta v. D.H. Mehta to mean 'a person in overall control of the day-to-day business of the company or the firm', the conviction of the appellant has to be set aside. The appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. The Partnership Act, 1932 creates civil liability. Further, the guarantor's liability under the Indian Contract Act, 1872 is a*

civil liability. The appellant may have civil liability and may also be liable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, vicarious liability in the criminal law in terms of Section 141 of the NI Act cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to Section 141 of the NI Act can be pinned when the person is in overall control of the day-to-day business of the company or firm. Vicarious liability under sub-section (2) to Section 141 of the NI Act can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company."

11. Examining the complaint in light of the aforenoted extract, this Court is of the considered opinion that the complaint lacks the necessary averments in terms of sub-sections (1) or (2) of Section 141 qua petitioner Nos. 3 and 4.

12. Accordingly, the complaint as well as the summoning order dated 23.11.2020 qua the petitioner Nos.3 to 5 are quashed and set aside.

13. The petition is disposed of in above terms.

MANOJ KUMAR OHRI, J

MAY 6, 2024/*rd*